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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GABE KAIMOWITZ,

Petitioner,

—v.—

BILL FREDERICK, THE *ORLANDO TIMES*, DR. CALVIN COLLINS, LOTTIE COLLINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF AND SUPPLEMENTAL BRIEF

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No. 92-79

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

GABE KAIMOWITZ, Petitioner,

v.

BILL FREDERICK, THE ORLANDO TIMES,
DR. CALVIN COLLINS,LOTTIE COLLINS, Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF AND SUPPLEMENTAL BRIEF

INTRODUCTION

Petitioner Gabe Kaimowitz submits this brief to address new matter raised by Respondent[1] and to note an important Court

[1] Petitioner also notes that due to a typographical error the Petition misstated the basis for invoking this Court's jurisdiction. Petitioner of course seeks review by writ of certiorari pursuant to 28 U.S.C. §1254(1) and not review of a certified question under 28 U.S.C. §1254(2).

of Appeals case decided since the filing of the pending Petition.

I.

RESPONDENT'S ARGUMENTATIVE COUNTER-STATEMENT OF FACTS ATTEMPTS TO MISCAST THE NATURE OF PETITIONER'S ACTION BELOW WHILE ALSO TWISTING PETITIONER'S ASSESSMENT OF THE CONFLICT IN CIRCUITS REGARDING RULE 11 AND SECTION 1988 SANCTIONS PRACTICE.

In an effort to divert the Court's attention from the conflict in the circuits, Respondent Bill Frederick[2] engages in an extensive counterstatement of the facts. As a result, Petitioner is mischaracterized as merely a disgruntled former employee striking back through a frivolous action. In fact, Petitioner's discharge was a relatively minor aspect of his claim that survived six motions for pre-verdict dismissal.[3]

Petitioner was dismissed from the Orlando Times in March 1987 and did not bring suit until 23 months later, when he found the Times refusing to accept his advertisements or the submissions of his clients and other black citizens of Orlando

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[2] Respondents Dr. Calvin Collins and Lottie Collins and The Orlando Times (the "newspaper defendants") elected not to submit a brief in opposition.

[3] Respondent does not contest that Petitioner in fact prevailed at trial to some extent when the jury found for him on the counterclaim brought by the newspaper defendants and that, notwithstanding their mixed record of success, the newspaper defendants were awarded a sanction equivalent to substantially all their counsel fees.

critical of the Mayor.[4] Respondent Frederick was at that time writing a column in the Times, a weekly targeted to black readers. This was particularly troubling since Petitioner was then representing black clients in a pending civil rights action filed in October 1988 against the City and Respondent.

Based on this suspicious pattern of circumstances and a November 1988 meeting between Respondent and the newspaper defendants, Petitioner believed there was concerted action by defendants against him and his clients.[5] Although the jury declined to make this inference, the facts underlying Petitioner's claim were apparent when the trial court denied Respondents' motion to dismiss, four summary judgment motions, and a directed verdict motion attacking Petitioner's conspiracy claim. Presumably, an inference so implausible as to be frivolous would not support six denials of preverdict dismissal and could thus not be sanctioned under Rule 11.

Respondent fails to contest this simple logic but instead quibbles with Petitioner's characterization of the degree of disarray in the Circuits regarding Rule 11. Respondent in essence argues that the conflict regarding determination and

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[4] Petitioner found the newspaper's behavior suspicious both because it was a black-owned newspaper with the avowed purpose of serving Orlando's black community and because the newspaper ordinarily published all news releases or similar announcements submitted to it by community groups or interested persons.

[5] See Lebovitz v. Miller, 856 F.2d 902, 905-07 (7th Cir. 1988) (denying sanctions and noting difficulty in assessing matters of circumstantial evidence and alleged conspiracy).

imposition of Rule 11 sanctions is not sufficiently express and formal but ironically attempts to prove this point by citing judicial inconsistency in the application of Rule 11. Respondent's brief only illustrates that the appellate courts are in both inter-circuit and intra-circuit discord[6] and that

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[6] See Resp. Brief at 10. It cannot be denied that some circuits, particularly the Second, have resisted Rule 11 sanctions when a matter has gone to trial unless there is evidence of affirmative misconduct by the sanctioned party that prevented the court from seeing the weakness of a claim at the pretrial stage. See, e.g., Healey v. Chelsea Resources, Ltd., 947 F.2d 611 (2d Cir. 1991)(sanctions reversed); Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2d. Cir. 1988), rev'd sub. nom. on other grounds Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989)(sanctions imposed where summary judgment defeated by possibly false affidavit). Other circuits, such as the First and Fifth, appear not to be influenced by a claim's pretrial success when adjudicating post hoc Rule 11 issues (see Pet. Brief at 10-11). The Sixth Circuit varies distinctly from panel to panel. Compare Mihalik v. Pro Arts, Inc., 851 F.2d 790, 794 (6th Cir. 1988)("remarkable" that case withstanding summary judgment could be sanctionable) with LeMaster v. United States, 891 F.2d 115 (6th Cir. 1989)(denial of summary judgment completely irrelevant to Rule 11 inquiry). Respondent's excerpt from Foster v. Mydas Assoc., Inc., 943 F.2d 139, 144 (1st Cir. 1991)(Resp. Brief at 12) might mislead a reader into believing that at least one panel surveyed the case law and found uniformity. Unfortunately, Respondent has misquoted the relevant portion of the Foster opinion by adding words not written by the First Circuit. Respondent also misconstrues Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991) cert. denied, __ U.S. __, 112 S.Ct. 913, 116 L.Ed.2d 813 (1992)

erratic and unwise application of Rule 11 calls for an exercise of this Court's supervisory power.[7] Furthermore, Petitioner does not contend that some circuits have made denial of pretrial dismissal motions a per se bar to sanctions. Rather, Petitioner notes that some courts have adopted at least a de facto presumption against sanctions in such cases while other courts treat this factor as having little or no importance.

II.

THE THIRD CIRCUIT'S RECENT DECISION IN HAINES V. LIGGETT GROUP, INC. ACCENTUATES THE CONFLICT IN THE CIRCUITS REGARDING APPROPRIATE PRACTICE AND STANDARDS GOVERNING JUDICIAL DISQUALIFICATION.

On September 4, the conflict in the circuits regarding recusal practice (see Pet. Brief at 16-18) was exacerbated by the Third Circuit's decision in Haines v. Liggett Group, Inc., __ F.2d ___, 1992 U.S. App. Lexis 21067 (3d Cir. 1992). In Haines, the court removed the trial judge from a case against several tobacco companies and affiliated defendants similar to the situation and allegations confronted by this Court in Cipollone v. Liggett Group, Inc., __ U.S. __, 112 S.Ct. 2608,

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as "not based primarily on Rule 11" when in fact the court found both Rule 11 and 28 U.S.C. §1927 equally applicable to the sanctioned attorney and law firm. See 932 F.2d at 1582.

[7] Regarding the status of the "least severe sanction" approach, Respondents are simply incorrect in failing to see a virtual bright line separating courts that have adopted the doctrine from those that reject or ignore it (see Pet. Brief at 13-15).

120 L.Ed.2d 407 (1992). Judge H. Lee Sarokin, who had presided over the lengthy and ongoing Cipollone litigation and similar tobacco lawsuits, wrote in the course of deciding a discovery dispute related to claims of privilege that the cigarette industry "may be the king of concealment and disinformation" and that other purported corporate villains were merely "rising pretenders."

Although Judge Sarokin's language may have been intemperate, it undoubtedly sprang from information he acquired in the performance of his judicial duties and conclusions he drew from the act of judging. Nonetheless, he was removed from the case because the Appeals Court feared that third parties reading the opinion would conclude that Judge Sarokin could not impartially preside over the remainder of the cigarette litigation. In Haines, the Third Circuit squarely aligned itself with the First Circuit in concluding that even bias acquired through judicial activity may require recusal. In contrast, five other circuits (including the Eleventh) hold that disqualifying bias must be extrajudicial unless it is so pervasive as to make the trial unfair. See Waller v. United States, __ U.S. __, 112 S.Ct. 2321, 119 L.Ed.2d 239 (1992)(White and O'Connor, JJ., dissenting from denial of certiorari); Pet. Brief at 15-18. Furthermore, the public attention and press coverage devoted to the cigarette lawsuits and Judge Sarokin's removal have made this one of those rare instances where division of the circuits has come to the attention of the public at large. See, e.g., Charles Strum, "Ruling in Tobacco Case Tests Boundaries of Judicial Bias," The New York Times p. 46, col. 1 (September 20, 1992).

Respondent acknowledges that this conflict of circuits exists but attempts to minimize it by suggesting it was not argued below (Resp. Brief at 18). In fact, Petitioner raised as grounds for recusal extrajudicial acts of the trial judge (membership in

a restrictive club discriminating against blacks and Jews). This line of inquiry was not, however, addressed by the trial judge, who summarily denied Petitioner's disqualification motion. Yet in earlier and subsequent matters involving Petitioner as counsel (rather than as a party as he is in this case), the trial judge recused himself, on one occasion stating that he did so because of bias against Petitioner for his "unprofessional conduct," a criticism that is arguably either judicially acquired or extrajudicial bias depending on how the judge came to see Petitioner as unprofessional.[8] Neither the Eleventh Circuit nor the trial judge explained its assessment of the disqualification issue (other than the trial court's attempt to excuse its failure to dismiss a claim subsequently characterized as frivolous; see Pet. Brief at 7a).

Respondent attempts to invoke this brusque silence to persuade this Court to allow continued festering of an inter-circuit conflict, inconsistency sure to discourage vigorous advocacy, and grave unfairness to Petitioner. Fairly read, the record in this case shows Petitioner raising serious disqualification issues that involve the acknowledged conflict among the courts regarding recusal and that an admittedly biased trial judge imposed more than $38,000 in sanctions against Petitioner. These circumstances make the instant case one appropriate for the Court's involvement both to resolve inter-circuit discord and to supervise lower court application

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[8] In addition, Petitioner argues that the depth of the trial court's enmity toward him requires recusal whatever the source of bias. See Berger v. United States, 255 U.S. 22 (1921). However, if the Eleventh Circuit employed the broader recusal approach of the First and Third Circuits, Petitioner's burden in obtaining disqualification would be lightened considerably.

of a rule with potential for grave misuse in the hands of biased judges.

CONCLUSION

For the reasons set forth in his Petition and this supplementary and responsive brief, Petitioner seeks review of this important case.

Respectfully submitted,

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